Supreme Court, U.
FILED
DEC 31 19
MICHAEL RODAK, JR.

No. 80-298

In the Supreme Court of the United States

OCTOBER TERM, 1980

ROGER D. MONROE, PETITIONER

v.

THE STANDARD OIL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

ALAN I. HOROWITZ
Assistant to the Solicitor General

ROBERT E. KOPP
DOUGLAS N. LETTER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

CARIN ANN CLAUSS
Solicitor of Labor

BEATE BLOCH
Associate Solicitor

LOIS G. WILLIAMS
Deputy Associate Solicitor

KERRY L. ADAMS
WILLIAM TAYLOR
Attorneys

Department of Labor
Washington, D.C. 20210

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-298

ROGER D. MONROE, PETITIONER

v.

THE STANDARD OIL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

QUESTION PRESENTED

Whether an employer violates the reemployment rights provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. 2021 *et seq.*, by depriving a reservist employee of an employment benefit solely because attendance at a military training exercise necessitates the reservist's absence from work on a particular day.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provision involved	1
Statement	1
Summary of argument	5
Argument	
Respondent violated 38 U.S.C. 2021(b)(3) in failing to make reasonable efforts to accommodate petitioner's training obligations in scheduling his 40-hour work week	8
A. The purpose of Section 2021(b)(3) is to minimize the economic disadvantages suffered by reservists in their civilian employment, whether or not those disadvantages result from intentional unequal treatment	9
B. The court of appeals' interpretation of Section 2021(b)(3) is at odds with principles established under other sections of the reemployment rights statute	16
C. Respondent violated Section 2021(b)(3) on the Facts of this case	21
Conclusion	25

TABLE OF AUTHORITIES

Cases:

Accardi v. *Pennsylvania R.R.*, 383 U.S. 225 22
Alabama Power Co. v. *Davis*, 431 U.S. 581 ..... 5, 9-10, 15, 16, 17, 18
Barrett v. *Grand Trunk Western R.R.*, 581 F.2d 132, cert. denied, 440 U.S. 946 22
Board of Education v. *Harris*, 444 U.S. 130 15

PREVIOUS PAGE WAS BLANK

Cases—Continued Page

Breeding v. *TRW, Inc.*, 447 F. Supp. 1177 21
Carlson v. *New Hampshire Dept. of Safety*, 609 F.2d 1024, cert. denied, 446 U.S. 913 ..... 20, 24
Carney v. *Cummins Engine Co.*, 602 F.2d 763, cert. denied, 444 U.S. 1073 ..... 11, 20, 23
Coffy v. *Republic Steel Corp.*, No. 79-81 (June 10, 1980) 10, 16, 17, 19
Fishgold v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275 ..... 5, 7, 9, 10, 16, 19
Foster v. *Dravo Corp.*, 420 U.S. 92 19
Hanning v. *Kaiser Aluminum and Chemical Corp.*, 82 Lab. Cas. ¶ 10,070 21
Hawes v. *General Motors Corp.*, 87 Lab. Cas. ¶ 11,713 21
Kaiser Aluminum and Chemical Corp., 82 Lab. Cas. (CCH) ¶ 10,070 21
Kidder v. *Eastern Air Lines, Inc.*, 469 F. Supp. 1060 ..... 18, 21
Lott v. *Goodyear Aerospace Corp.*, 395 F. Supp. 866 21
McKinney v. *Missouri K.-T. R.R.*, 357 U.S. 265 ..... 9, 16, 22
Peel v. *Florida Department of Transportation*, 443 F. Supp. 451, aff'd, 600 F.2d 1070 13
Teamsters Local 612 v. *Helton*, 413 F.2d 1380 17
West v. *Safeway Stores, Inc.*, 609 F.2d 147 ..... 8, 13, 19, 20, 21, 24

Statutes:

Military Selective Service Act of 1967, 50 U.S.C. app.:

Section 9, 50 U.S.C. app. 459 10
Section 9(c)(3), 50 U.S.C. app. 459(c)(3) 10

Reserve Forces Act of 1955, Pub. L. No. 305, ch. 665, Section 262(f), 69 Stat. 598 10
Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. 2021 *et seq.* 3, 9

38 U.S.C. 2021(a) 10, 23
38 U.S.C. 2021(b)(3) ..... *passim*
38 U.S.C. 2022 3
38 U.S.C. 2024(c) 10
38 U.S.C. 2024(d) 10, 11, 18, 20

Statutes—Continued Page

Pub. L. No. 51, ch. 144, Section 1(s), 65 Stat. 75.. 10
Pub. L. No. 86-632, 74 Stat. 467 10
Pub. L. No. 90-491, 82 Stat. 790 11

Miscellaneous:

H.R. 11509, 89th Cong., 2d Sess. (1966) 11, 14
H.R. Rep. No. 1303, 89th Cong., 2d Sess. (1966)..11, 14, 24
H.R. Rep. No. 1303, 90th Cong., 2d Sess. (1968)..2, 11, 14
S. Rep. No. 1477, 90th Cong., 2d Sess. (1968).....2, 11, 15

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 613 F.2d 641. The opinion of the district court (Pet. App. 17a-26a) is reported at 446 F. Supp. 616.

JURISDICTION

The judgment of the court of appeals (Pet. App. 14a-15a) was entered on January 24, 1980, and a petition for rehearing was denied on April 15, 1980 (Pet. App. 16a). On July 8, 1980, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including August 28, 1980 (Pet. App. 27a). The petition for a writ of certiorari was filed on August 26, 1980, and was granted on November 3, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

38 U.S.C. 2021(b)(3) provides:

> Any person who holds a position described in clause (A) or (B) of subsection (a) of this section shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces.

STATEMENT

1. Between May 1975 and August 1976, the period relevant to this action, petitioner was a full time employee at respondent's Lima, Ohio, refinery. The refinery operated 24 hours per day, seven days per week, and the work day was divided into three eight-

hour shifts. Respondent rotated the shifts to which employees were assigned, so that each employee was scheduled to work on five days per week, generally in succession, but with a different five-day sequence each week. The system, therefore, afforded each employee 40 hours of work each week (Pet. App. 2a, 18a).[1] The collective bargaining agreement in force at the refinery permitted employees to exchange scheduled shifts, provided that respondent incurred no overtime or premium pay obligation as a result of the change.[2]

During the same period of time, petitioner was also subject to certain obligations as a military reservist.[3] As a general rule, he was required to train with his unit on one weekend each month and for a

---

[1] The parties entered into a stipulation (J.A. 24-40) in the district court concerning the relevant facts.

[2] Article V, ¶ 23 of the collective bargaining agreement between respondent and the Oil, Chemical, and Atomic Workers International Union provided (Pet. App. 19a):

> Employees on shift may, by mutual consent and with the consent of their foreman, change shifts provided such change does not require the payment of overtime or premium pay. Where such changes require the payment of overtime or premium pay, such changes may be made only where there exists a critical need of such changes proven to the satisfaction of the Plant Manager.

[3] It is not clear from the record whether petitioner was a member of the Ready Reserve or the National Guard, but it makes no difference for the purposes of this case. Both Ready Reservists and National Guardsmen are equally entitled to the protection of 38 U.S.C. 2021(b)(3). See S. Rep. No. 1477, 90th Cong., 2d Sess. 1, 5 (1968); H.R. Rep. No. 1303, 90th Cong., 2d Sess. 3, 6 (1968). In this brief, the term "reservist" will be used to encompass both Ready Reservists and National Guardsmen.

two-week period each summer (Pet. App. 2a). In scheduling its employees' work assignments, respondent took no cognizance of petitioner's military obligations and therefore often scheduled his five-day week to include days on which he was obligated to attend reserve sessions. On four of those occasions, petitioner was able to exchange shifts with other employees (*id.* at 3a, 19a). On 24 other days on which his work schedule conflicted with his military training obligations, however, petitioner was unable to arrange an exchange of work assignments, and therefore he worked and was paid for fewer than 40 hours in the corresponding week (*id.* at 3a, 19a-20a). Respondent took no steps to provide petitioner with substituted hours during those weeks to make up for his lost working time (*id.* at 3a). As a result, petitioner lost a total of 192 hours of work and salary over this 15-month period (*id.* at 3a, 20a).

2. Petitioner brought this action in the United States District Court for the Northern District of Ohio claiming that respondent's failure to attempt to schedule his work days to avoid a conflict with his military obligations violated the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. 2021 *et seq.*[4] Specifically, he claimed that respondent had violated 38 U.S.C. 2021(b)(3), which provides that no employee shall be denied "any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces." Petitioner contended that respondent, in making no attempt to schedule his work to avoid a conflict with his military obligations, denied him the right to work a 40-hour week, an

---

[4] The Department of Justice represents petitioner pursuant to 38 U.S.C. 2022.

"incident or advantage of employment" within the meaning of the statute, because of his reserve obligations.

The district court granted petitioner's motion for summary judgment based upon the stipulated facts (Pet. App. 17a-26a). The court found that "being scheduled for a full forty hour week at the defendant's refinery constitutes an incident or advantage of employment" (*id.* at 24a). Accordingly, the court held that petitioner was denied that advantage of employment in violation of the Act because of respondent's failure to make an accommodation in its scheduling to account for petitioner's military obligations. In so holding, the court explicitly rejected respondent's contention that the statute requires only that an employer treat all of its employees in a neutral fashion. Rather, because of the importance of a properly trained military force to the security of the nation, the statute requires "positive action on the part of the employer" to avoid the denial of advantages of employment to reservists (*id.* at 24a-25a). The court entered judgment for petitioner for $1,086.72, the amount of wages lost as a result of respondent's wrongful failure to attempt to provide petitioner with the opportunity to work a 40-hour week during the period at issue (*id.* at 26a).

The court of appeals reversed (Pet. App. 1a-13a). The court agreed with the district court that the right to be scheduled for 40 hours of work per week was an "incident or advantage" of petitioner's employment (*id.* at 7a-8a). But the court of appeals ruled that a condition precedent to the exercise of the right to work 40 hours was petitioner's presence at work on the scheduled days (*id.* at 10a, 12a). The court recognized that petitioner could not be present

on some of those days because of his reserve obligations, but it held that the statute offered no protection against the adverse consequences of these absences. Rather, the court held that the statute protects reservists only against "intentional unequal treatment" or "on-the-job bias" by their employers (*id.* at 10a, 11a). Hence, the statute is satisfied if "collective bargaining agreements and employment rules [are] facially neutral and [are] applied uniformly and equally to all employees" (*id.* at 11a). The court found that this test was met in this case because petitioner's absences were treated just as non-military absences of other employees would have been treated (*id.* at 11a-12a).

The court of appeals admitted that the statute was subject to two possible interpretations, including that adopted by the district court (Pet. App. 10a). But it expressly rejected the district court's holding that the Act requires accommodation of the reservist's schedule, characterizing that interpretation as a "fashioning of exclusive preferential rights" (*id.* at 10a) for reservists that could not be accepted "[i]n the absence of a clear and unambiguous statutory mandate" (*id.* at 11a).

SUMMARY OF ARGUMENT

The primary purpose of the veterans' reemployment rights provisions (38 U.S.C. 2021 *et seq.*) is "to minimize the disruption in individuals' lives resulting from the national need for military personnel" by providing protection for veterans and reservists against disadvantages in their civilian employment related to their military obligations. *Alabama Power Co.* v. *Davis*, 431 U.S. 581, 583 (1977). See also *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328

U.S. 275, 284 (1946). The recognition of different problems facing members of the military over the years has led Congress periodically to expand the protections offered by these provisions.

The long-standing protection for veterans returning from lengthy periods of military service was augmented in 1960 when the statute was amended to provide traditional reemployment rights—"seniority, status, pay, and vacation"—to reservists returning from training sessions of less than three months' duration. These traditional rights, however, did not adequately protect reservists against disadvantages suffered in their daily worklife as a result of their short-term training absences. Congress enacted 38 U.S.C. 2021(b)(3) in 1968 to provide additional protection.

The court of appeals' construction of 38 U.S.C. 2021(b)(3) conflicts with the language and legislative history of the statute and frustrates the congressional intent to minimize economic disincentives to military service. The court below held that Section 2021(b)(3) protects a reservist only against "intentional unequal treatment," not against the application of facially neutral rules. By its terms, however, the statute protects a reservist against the denial of any employment benefit because of his military obligations. It contains no indication that discriminatory intent is required. Indeed, the plain language of the statute, in focusing on problems resulting from a reservist's *obligations*, suggests that it was aimed primarily, not at intentional discrimination, but at the more pervasive problem of the adverse effects upon reservists of facially neutral rules.

This conclusion is supported by the legislative history, which emphasizes that the statute protects re-

servists against employment practices that disadvantage or discriminate against them, but makes no reference to intentional discrimination. Because the essential impact of the reservist's obligations on his civilian employment is his periodic absence from work, it is clear that the statute does not permit absence from work to be used as a ground for denying a benefit when the absence is occasioned solely by a reservist's military commitment.

The court of appeals ignored the well-settled rules for construction of the veterans' reemployment rights provisions in construing Section 2021(b)(3) not to apply to facially neutral employment practices. The provisions are to be construed "as parts of an organic whole and [given] as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, *supra*, 328 U.S. at 285. Nonetheless, the court of appeals interpreted Section 2021(b)(3) narrowly, although it conceded that the interpretation benefiting the serviceman was a possible one, because it found no unambiguous congressional intent to the contrary.

Moreover, the court of appeals' interpretation of Section 2021(b)(3) is contrary to the established purpose and requirements of the reemployment provisions as a whole. In the context of seniority benefits, this Court has emphasized that the statute cannot be satisfied by applying a facially neutral rule and treating a military absence like other personal leaves of absence. The requirement that military absences be placed in a special category is not "preferential treatment;" a reservist is no better off, relative to his fellow employees, for having entered military service. Rather, such special treatment of military absences is necessary in order to attempt to

ensure that veterans and reservists are no worse off for having entered military service. As the Fifth Circuit has noted, if employers are permitted to deny a benefit on the ground that it is conditioned upon presence at work, Section 2021(b)(3) "would be effectively annulled." *West* v. *Safeway Stores, Inc.*, 609 F.2d 147, 149 (1980).

On these facts, it is clear that respondent violated Section 2021(b)(3). Because, as both courts below held, being scheduled for a 40-hour work week is an "incident or advantage of employment" at respondent's plant, the statute requires that benefit to be made available to petitioner in a meaningful fashion. Scheduling petitioner to work hours that conflict with his military obligations does not satisfy this requirement. Thus, respondent had a duty to make reasonable efforts to accommodate petitioner's obligations. There is no evidence to suggest that accommodation would have been unduly burdensome here, and, in any event, it is undisputed that respondent made no effort to accommodate.

ARGUMENT

RESPONDENT VIOLATED 38 U.S.C. 2021(b)(3) IN FAILING TO MAKE REASONABLE EFFORTS TO ACCOMMODATE PETITIONER'S TRAINING OBLIGATIONS IN SCHEDULING HIS 40-HOUR WORK WEEK

The court of appeals rejected petitioner's claim because it held that 38 U.S.C. 2021(b)(3) is designed to protect a reservist only against "intentional unequal treatment" or "bias" and thus that an application of "facially neutral rules" cannot result in a statutory violation (Pet. App. 10a-11a). This narrow construction is contrary not only to the con-

gressional intent in enacting Section 2021 (b) (3), as evidenced by its plain language and legislative history, but also to the fundamental principles underlying the veterans' reemployment rights provisions in general.

A. The Purpose of Section 2021(b)(3) Is To Minimize the Economic Disadvantages Suffered by Reservists in Their Civilian Employment, Whether or Not Those Disadvantages Result From Intentional Unequal Treatment

The veterans' reemployment rights provisions, which are now codified at 38 U.S.C. 2021 *et seq.*, have evolved over the past 40 years to meet different problems encountered by veterans and reservists in their civilian employment as a result of their military service. This Court has had several occasions to interpret these provisions, specifically in connection with seniority benefits for veterans, and it has laid down general principles concerning their construction. In the first case interpreting these provisions, when they applied only to returning veterans, the Court declared that the provisions were designed to ensure that "[h]e who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284 (1946). Put another way, the veteran "is not to be disadvantaged by serving his country." *McKinney* v. *Missouri K.-T. R.R.*, 357 U.S. 265, 270 (1958). More recently, after the provisions were amended to their present form with the inclusion of additional protection for reservists, this Court declared that "Section 9 of the Act evidences Congress' desire to minimize the disruption in individuals' lives resulting from the national need for military personnel." *Alabama Power*

Co. v. *Davis*, 431 U.S. 581, 583 (1977).[5] Moreover, the Court repeatedly has emphasized that the provisions are to be "liberally construed for the benefit of the returning veteran." *Coffy* v. *Republic Steel Corp.*, No. 79-81 (June 10, 1980), slip op. 5. See also, *e.g.*, *Fishgold* v. *Sullivan Drydock & Repair Corp.*, *supra*, 328 U.S. at 285.

1. The veterans' reemployment rights provisions had their genesis in the Nation's first peacetime draft law, passed in 1940 (54 Stat. 885, 890), which provided that veterans returning to civilian employment from active duty were entitled to reinstatement to the position that they left or one of "like seniority, status, and pay." 38 U.S.C. 2021(a). In 1951, as part of an effort to strengthen the Nation's reserve forces, Congress extended reinstatement rights to employees returning from training duty. See Pub. L. No. 51, ch. 144, Section 1(s), 65 Stat. 75, 86-87. Subsequently, the Reserve Forces Act of 1955, Pub. L. No. 305, ch. 665, Section 262(f), 69 Stat. 598, 602, provided that employees returning from their active duty for training of more than three months in the Ready Reserve were entitled to the same reemployment rights as inductees, with limited exceptions. In 1960, these reemployment rights were extended to National Guardsmen, Pub. L. No. 86-632, 74 Stat. 467. See 38 U.S.C. 2024(c). In addition, a new section (now codified at 38 U.S.C. 2024(d)) was added in 1960 to deal with problems suffered by employees

---

[5] Prior to their recodification in 1974, the veterans' reemployment rights provisions were codified at 50 U.S.C. App. 459, as Section 9 of the Military Selective Service Act of 1967. See *Coffy* v. *Republic Steel Corp.*, No. 79-81 (June 10, 1980), slip op. 2 n.2. The section involved here, 38 U.S.C. 2021(b)(3), was Section 9(c)(3) of that Act, 50 U.S.C. app. (1970 ed.) 459(c)(3).

who had military training obligations of less than three months' duration. This section provided that employees must be granted a leave of absence for such training and, upon their return, must be restored to their position "with such seniority, status, pay, and vacation" as they would have had if not absent for training.

The traditional reemployment rights guaranteed by Section 2024(d), however, were inadequate to deal with the special problems encountered by reservists as a result of their short-term training obligations. Because absences caused by these training obligations are ordinarily of only two days or two weeks duration, there is no significant problem of reservists' not being restored to their position when they return from training. But the necessity for periodic short absences from work does create certain disadvantages in the reservist's daily worklife, which are not a problem in the context of a single lengthy absence of several months or years for military service. Accordingly, the Department of Labor proposed legislation for the purpose of strengthening the existing reemployment protection for reservists. H.R. Rep. No. 1303, 89th Cong., 2d Sess. 1, 8 (1966). See also S. Rep. No. 1477, 90th Cong., 2d Sess. 2, 6 (1968); H.R. Rep. No. 1303, 90th Cong., 2d Sess. 3, 7 (1968); *Carney* v. *Cummins Engine Co.*, 602 F.2d 763, 765 (7th Cir. 1979), cert. denied, 444 U.S. 1073 (1980). The bill containing what is now 38 U.S.C. 2021(b)(3) was passed by the House of Representatives during the 89th Congress, but it did not reach the floor of the Senate in that Congress. H.R. 11509, 89th Cong., 2d Sess. (1966). Section 2021(b)(3) was reintroduced in the same form in the following Congress and was enacted without amendment. Pub. L. No. 90-491, 82 Stat. 790.

The plain language of 38 U.S.C. 2021(b)(3) belies the court of appeals' conclusion that it proscribes only "intentional unequal treatment." The statute provides that an employee "shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation" as a reservist. This unqualified language contains no suggestion that an intent to discriminate against reservists is a prerequisite to a violation of Section 2021(b)(3). Intentional discrimination against reservists is a problem that is likely to occur only rarely, and there is no reason to believe that Congress felt it necessary to add a special subsection to deal with such a limited problem. Moreover, the fact that the provision focuses on a reservist's *obligation* and not simply on his status as a reservist, indicates that the thrust of the statutory protection does not relate to bias against reservists *per se*. Rather, Section 2021(b)(3) is aimed at a more pervasive problem—the adverse effects of the application of facially neutral rules that reservists suffer in their daily worklife as a result of their military obligations.

Because Section 2021(b)(3) does not contain an implied requirement of intent to discriminate against reservists, it follows from the plain language of the statute that petitioner's reemployment rights have been violated. As both lower courts held (Pet. App. 7a-8a, 24a), the right to be scheduled to work a 40-hour week at respondent's plant is an "incident or advantage of employment." Petitioner was denied that right solely as a result of his reserve obligations, because his absences from work were compelled by conflicts with his military training.

It is true, of course, that the direct cause of petitioner's failure to work 40 hours was his absence

from work on the scheduled days, but those absences were an inevitable result of his military obligations. The statutory requirement that reserve obligations be the cause of the denial of an employment benefit surely must include those cases where the direct cause is an absence from work occasioned solely by those obligations. The major short-term military obligation of reservists is to attend periodic training sessions, and the significant effect of that obligation on the reservist's civilian employment is that it requires his absence from work. The addition of 38 U.S.C. 2021(b)(3) was necessary specifically to deal with disadvantages in a reservist's daily worklife caused by these absences, against which the traditional reemployment rights provisions offer inadequate protection. If the denial of benefits caused by absences attributable to military obligations is not prohibited by Section 2021(b)(3), the provision's protection is of little practical significance. See *West* v. *Safeway Stores, Inc.*, 609 F.2d 147, 149 (5th Cir. 1980).[6]

2. The sparse legislative history supports the conclusion that Section 2021(b)(3) not only prohibits intentional unequal treatment but also seeks to minimize the economic disadvantages suffered by reserv-

---

[6] If disadvantages resulting solely from a reservist's absences are afforded no protection from the operation of neutral rules, an employer would be free to deny a promotion to a reservist by making availability on weekends a condition of promotion or could discharge a reservist because of his absence from work on three consecutive days without authorized leave. See *Peel* v. *Florida Department of Transportation*, 443 F.Supp. 451, 453 (N.D. Fla. 1977), aff'd, 600 F.2d 1070 (5th Cir. 1979). Section 2021(b)(3) plainly was intended to prohibit such conduct, regardless of the employer's motivation.

ists, such as petitioner, due to the application of facially neutral rules to their training-related absences. This intent is expressed most clearly in the House Committee Report issued in 1966, when the bill containing Section 2021(b)(3), H.R. 11509, was passed only by the House of Representatives. The Committee explained that the amendment was "designed to enable reservists and guardsmen who leave their jobs to perform training in the Armed Forces * * * to enjoy all of the employment opportunities and benefits accorded their coworkers who * * * do not have a Reserve obligation." H.R. Rep. No. 1303, 89th Cong., 2d Sess. 3 (1966). The rationale for the amendment was succinctly expressed: "If these young men are essential to our national defense, then certainly our Government and employers have a moral obligation to see that their economic well being is disrupted to the minimum extent possible." *Ibid.*

Section 2021(b)(3) was reintroduced as part of H.R. 1093 in the 90th Congress and enacted in the identical form in which it had passed the House in 1966. The discussion of the amendment in the 1968 committee reports was more abbreviated than in 1966 and contained no statement of the rationale underlying the amendment. The House Report did state that the amendment was intended to alleviate the increasing problem of "[e]mployment practices which disadvantage employees with Reserve obligations." H.R. Rep. No. 1303, 90th Cong., 2d Sess. 3 (1968). The Senate made no change in the text of Section 2021(b)(3) as introduced in the House. The Senate Report contained a paragraph that was a condensed version of the text of the House Report concerning Section 2021(b)(3), with several editorial changes. It identified the problem to be remedied by the bill

as "[e]mployment practices that discriminate against employees with Reserve obligations." S. Rep. No. 1477, 90th Cong., 2d Sess. 2 (1968).

Contrary to the finding of the court of appeals (Pet. App. 11a), the 1968 legislative history does not reflect a congressional intent to limit the application of Section 2021(b)(3) to instances of bias or intentional unequal treatment of reservists. The reports make no reference to intentional discrimination, but focus instead on employment practices that disadvantage or discriminate against reservists. Plainly, Congress was concerned about the adverse impact of certain employment practices, which may not be discriminatory in and of themselves, upon reservists because of their periodic absences from work in order to satisfy military obligations.[7]

In sum, Section 2021(b)(3) was intended to protect reservists against the denial of employment benefits through the operation of facially neutral rules. The congressional intent, explicitly stated in 1966, was to ensure that reservists' economic well being would be disrupted to the minimum extent possible. See *Alabama Power Co.* v. *Davis*, *supra*, 431 U.S. at 583.

---

[7] This concern is more evident in the House Report, where the word "disadvantage" clearly connotes an inevitable effect of a practice rather than an intent to discriminate. The Senate Report, although it uses the word "discriminate," also focuses on the effect of employment practices. "Discriminate" may connote bias where it modifies the word "intent," but generally refers as well to inequitable effects that may occur even in the absence of an intent to discriminate. Thus, even where the statutory language itself refers only to "discrimination," it may also cover the situation where a facially neutral employment practice has the effect of treating a discrete group differently. See *Board of Education* v. *Harris*, 444 U.S. 130, 149 (1979).

B. The Court of Appeals' Interpretation of Section 2021 (b)(3) Is At Odds With Principles Established Under Other Sections of the Reemployment Rights Statute

Application of the principles that this Court has established for the construction of the veterans' reemployment rights provisions compels the conclusion that the court of appeals misinterpreted Section 2021 (b)(3). First, the court of appeals turned on its head the long-established principle that the provisions are to be liberally construed in favor of the veteran. See *Coffy* v. *Republic Steel Corp.*, *supra*, slip op. 5. Although it found that the district court's reading of the statute in favor of the reservist—that the application of facially neutral rules may violate Section 2021(b)(3)—was a plausible interpretation, the court of appeals held that its own narrow view of the statutory protection must be adopted "[i]n the absence of a clear and unambiguous legislative mandate to the contrary" (Pet. App. 10a-11a). Second, the court of appeals failed "to construe the separate provisions of the Act as parts of an organic whole" (*Fishgold* v. *Sullivan Drydock & Repair Corp.*, *supra*, 328 U.S. at 285), although it did pay lip service to that principle (see Pet. App. 8a). In fact, the court of appeals' interpretation of Section 2021(b)(3) is at odds with the fundamental purpose and established requirements of the reemployment rights provisions as a whole.

The general objective of the veterans' reemployment rights provisions is to minimize the disadvantages suffered by veterans and reservists in their civilian employment. See *Alabama Power Co.* v. *Davis*, *supra*, 431 U.S. at 583; *McKinney* v. *Missouri K.-T. R.R.*, *supra*, 357 U.S. at 270; *Fishgold* v. *Sullivan*

Drydock & Repair Co., supra, 328 U.S. at 285. Whether these provisions have been violated depends upon the effect on the veteran or reservist, not on the employer's motive.[8] Thus, a returning veteran is entitled to reinstatement at the seniority level that he would have reached had he not entered the military, even if a lower level of seniority would result from the application of the employer's facially neutral rules with no discriminatory intent. See, *e.g., Coffy* v. *Republic Steel Corp., supra; Alabama Power Co.* v. *Davis, supra.* The court of appeals, however, refused to interpret Section 2021(b)(3) as requiring an employer to go beyond its facially neutral rules in accommodating a reservist's military obligations, explaining that such an interpretation would entail "preferential treatment" for reservists (Pet. App. 11a). This erroneous characterization of petitioner's contention is based upon a fundamental misperception of the reemployment rights provisions.

In asking that he not be denied the right to work a 40-hour week because of his military obligations, petitioner is seeking the same treatment as other employees without reserve obligations, not preferential treatment. At respondent's refinery, all employees are scheduled to work 40 hours, and respondent will not rearrange the schedule to accommodate personal leaves of absence due to illness or other reasons. Petitioner, who is as likely to require personal leaves of absence as any other employee, is equally bound by this rule and is entitled to no special consideration regarding non-military leaves of absence. But if peti-

[8] It has always been recognized that good faith is not a defense to an action for damages for violation of the statute. See, *e.g., Teamsters Local 612* v. *Helton,* 413 F.2d 1380, 1385 (5th Cir. 1969).

tioner is to be placed on an equal footing with his fellow employees, his military absences cannot simply be treated as personal leaves of absence. A reservist's absences result from obligations that other employees have not assumed, and it is the primary purpose of the veterans' reemployment rights provisions to protect the reservist against disadvantages that would otherwise be caused by these obligations.

Thus, the statute does require special treatment of the reservist's *absences*—they cannot be equated with other absences for the purposes of applying the employer's rules. But this special treatment is not preferential treatment for the *reservist*; he does not gain any advantage relative to his fellow employees by becoming a member of the military. To the extent that it makes sense to characterize this special treatment of military absences as a "preference," it is a preference that has been mandated by Congress. See *Kidder* v. *Eastern Air Lines, Inc.*, 469 F. Supp. 1060, 1067 n.7 (S.D. Fla. 1978).[9]

This Court has repeatedly rejected the argument that the requirements of the statute may be satisfied by treating military obligations as personal leaves of absence. In *Alabama Power Co.* v. *Davis*, *supra*, for example, the Court held that a veteran was entitled to have his military service years credited toward the accrual of his pension benefits although the pension plan provided that "[e]mployees on leave of

---

[9] The court of appeals recognized that Section 2024(d) "creates special rights for reservists" (Pet. App. 8a). It gave no explanation why Section 2021(b)(3), which was designed to expand the protections of Section 2024(d) that Congress deemed inadequate, should be construed only to guarantee "neutral" treatment for reservists despite the congressional intent to create special rights in Section 2024(d).

absence without regular pay" did not have that time credited toward pension benefits. See 431 U.S. at 591. Similarly, in *Coffy* v. *Republic Steel Corp.*, *supra*, the Court held that a veteran's service time had to be counted in computing supplemental unemployment benefit (SUB) credits although employees on leaves of absence did not accrue these credits. See slip op. 7. Clearly, the reemployment rights provisions are not satisfied by treating military absences as other leaves of absence are treated under a benefit plan or collective bargaining agreement.[10] A different rule would violate the basic principle that "no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, *supra*, 328 U.S. at 285.

The lower courts have recognized that Section 2021(b)(3), when read in harmony with the other reemployment rights provisions, must protect reservists against the adverse effects of facially neutral rules. Indeed, on facts almost identical to those in the instant case, the Fifth Circuit has held that an employer must accommodate a National Guardsman's training obligations in scheduling his 40-hour work week. In *West* v. *Safeway Stores, Inc.*, *supra*, employees were guaranteed a 40-hour work week, but that guarantee was negated if an employee was absent on a scheduled day. West was treated as any other "absent" employee when his weekend training duties conflicted with his scheduled work days. In holding that the employer's conduct violated the stat-

---

[10] This principle applies to all benefits protected by the statute, not only those that involve seniority or length of service. See *Foster* v. *Dravo Corp.*, 420 U.S. 92, 99 n.7 (1975).

ute, the court of appeals recognized that West was seeking not preferential treatment, but only "the same benefits secured to other employees." 609 F.2d at 149. The court explicitly rejected the employer's contention that the guarantee of a 40-hour week was conditional on the presence of the employee. If that argument were accepted, the court observed, Section 2021(b)(3) "would be effectively annulled [because] [t]he essence of reserve duty in this context is absence from work." *Ibid.* Thus, the court concluded that "the congressional intent that employees not be penalized for serving their country" required the employer to accommodate West's training obligations and provide him with a 40-hour work week. *Id.* at 150-151.

Two other courts of appeals have also rejected the narrow construction given to Section 2021(b)(3) by the court below. In *Carney* v. *Cummins Engine Co., supra,* the Seventh Circuit ruled that an employer violated Section 2021(b)(3) in charging a National Guardsman with missed overtime opportunities on days when he was absent from work because of his military obligations. The court noted that the "clear import" of the statute was to extend to reservists protection from a wide variety of economic disadvantages that result from their training absences—protection that would not be appropriate in the context of longer-term absences of veterans and that goes beyond benefits relating to "seniority, status, pay and vacation," which are guaranteed to reservists by 38 U.S.C. 2024(d). 602 F.2d at 766. And in *Carlson* v. *New Hampshire Dept. of Safety,* 609 F.2d 1024 (1979), cert. denied, 446 U.S. 913 (1980), the First Circuit held that an employer violated Section 2021(b)(3) by transferring a

reservist to a less desirable assignment because of conflicts between his military training responsibilities and his work schedule. The court found unavailing the employer's contention that the transfer was based not on the reservist's military obligations but only on his absences. 609 F.2d at 1027 n.5. The fact that the reservist was treated the same as other employees with similar absences did not demonstrate compliance with the statute, because the guarantee to reservists of equal treatment with their fellow employees refers not "to 'those coworkers away on non-military leave of absence' but to the more embrasive class of 'coworkers not having [reserve] obligations.'" *Id.* at 1027, quoting *Lott* v. *Goodyear Aerospace Corp.*, 395 F. Supp. 866, 869-870 (N.D. Ohio 1975).[11]

C. Respondent Violated Section 2021(b)(3) on the Facts of This Case

Applying the correct interpretation of Section 2021 (b) (3) to the facts of this case, it is apparent that the court of appeals erred in holding that respondent did not violate the statute. Both the district court (Pet. App. 24a) and the court of appeals (*id.*

---

[11] In addition, several district courts have found that Section 2021(b) (3) protects reservists from the denial of benefits such as holiday pay and overtime opportunities because of their military absences, even though a non-military absence would be legitimate grounds for such a denial. See *Kidder* v. *Eastern Air Lines, Inc., supra*; *Hanning* v. *Kaiser Aluminum and Chemical Corp.*, 82 Lab. Cas. ¶ 10,070 (E.D. La. 1977); *Lott* v. *Goodyear Aerospace Corp., supra.* See also *Hawes* v. *General Motors Corp.*, 87 Lab. Cas. ¶ 11,713 (N.D. Ohio 1979). But see *Breeding* v. *TRW, Inc.*, 477 F. Supp. 1177 (M.D. Tenn. 1979), appeal pending, No. 79-1629 (6th Cir.).

at 7a-8a) found that the right to be scheduled for a 40-hour work week was an "incident or advantage" of petitioner's employment at respondent's refinery.[12] If this right is to have any meaning, the hours must be scheduled such that it is not impossible for an employee to work them.[13] Thus, respondent cannot be said to have complied with the statute simply because a schedule was issued that included 40 hours for petitioner, where those hours conflicted with his military obligations. Congress' intent in enacting Section 2021 (b) (3) was to protect meaningful benefits, not illusory ones. As this Court said in the seniority context in *Accardi* v. *Pennsylvania R.R.*, 383 U.S. 225, 230 (1966), the statutory requirement cannot be satisfied by granting veterans seniority "in some general abstract sense and then denying them the perquisites and benefits that flow from it." Similarly, the statutory requirement cannot be satisfied here by scheduling a reservist for 40 hours of work when it is impossible

---

[12] This conclusion was based on the established custom and practice at the refinery. Such practices, along with the specific language of a collective bargaining agreement, are the source of employee rights under the statute. See *McKinney* v. *Missouri K.-T. R.R., supra*, 357 U.S. at 273-274; *Barrett* v. *Grand Trunk Western R.R.*, 581 F.2d 132, 136 (7th Cir. 1978), cert. denied, 440 U.S. 946 (1979). Section 2021 (b) (3) does not guarantee to all reservists the right to work a 40-hour week; the statutory protection depends upon whether employees have that right at the reservist's particular place of employment.

[13] For example, it would surely be a breach of a non-reservist employee's right to a 40-hour week if he were scheduled to work in two different places at the same time, or to work 40 hours in a row.

for him to meet that schedule because of a conflict with his training obligation.[14]

Section 2021(b)(3) requires that a reservist's opportunity to work and earn his pay not be denied because of his military obligations. It does not require, however, that a reservist be paid for hours that he does not work.[15] There may be situations where it is impossible or unduly burdensome for an employer to accommodate a reservist's military absences in its scheduling so that he can be given the opportunity to work. In those situations, the statute would not be violated by the failure to accommodate.[16] Thus, for example, petitioner is not entitled to compensation for work weeks lost because of his mandatory attendance at a two-week summer training ses-

---

[14] Under the court of appeals' view, Section 2021(b)(3) would have been violated here only if respondent had, for some perverse reason, issued a schedule that did not give petitioner his complement of 40 hours. That violation could easily have been cured, presumably, by amending that schedule to include additional hours for petitioner on days when it would be impossible for him to work because of his military obligations. It is exceedingly unlikely that Congress intended the statutory protection to be so flimsy.

[15] Petitioner, of course, was awarded compensation in the district court to repay him for the hours of work that he was denied. But this award was a remedy for respondent's violation of the statute in refusing to provide petitioner the opportunity to work 40 hours. Where an employer offers a reservist substituted hours to accommodate his military obligations, he must work those hours in order to be paid. See *Carney* v. *Cummins Engine Co., supra*, 602 F.2d at 766 n.3.

[16] Cf. 38 U.S.C. 2021(a) (returning veteran must be restored to his prior position or one of like seniority, status, and pay "unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so.")

sion. The statute only requires an employer to take reasonable steps to accommodate the reservist. See *West* v. *Safeway Stores, Inc.*, *supra*, 609 F.2d at 150 n.8; *Carlson* v. *New Hampshire Dept. of Safety*, *supra*, 609 F.2d at 1027 n.6.

In this case, the record contains no evidence that it would have been unduly burdensome for respondent to accommodate petitioner's training schedule. Indeed, it is undisputed that respondent made no effort to do so. See J.A. 26; Pet. App. 3a.[17] Under these circumstances, there can be little doubt that respondent violated Section 2021(b) in denying petitioner the opportunity to work a 40-hour week. The court of appeals' contrary conclusion unnecessarily presents a reservist with a choice between discontinuing his service in the reserves and foregoing the full benefits of his civilian employment. The statutory protection for veterans and reservists helps to eliminate such a disincentive to military service by easing its adverse economic consequences. Unless the court of appeals' interpretation of Section 2021(b)(3) is rejected, this congressional purpose will be thwarted,

---

[17] The court of appeals' suggestion that any duty to accommodate was satisfied by the provision of the collective bargaining agreement permitting employees to switch shifts is mistaken. The court's misunderstanding of the thrust of the veterans' reemployment rights provisions is evidenced by its comment that petitioner's inability to work 40 hours was "attributable to the lack of cooperation on the part of his fellow employees" (Pet. App. 12a). It is not the responsibility of a reservist's fellow employees to act on their own initiative to minimize the economic dislocation in reservists' lives resulting from their military obligations. Congress has placed that responsibility on their civilian employers. See H.R. Rep. No. 1303, 89th Cong., 2d Sess. 3 (1966).

and the effort to strengthen the Nation's reserve forces will be impaired.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

ALAN I. HOROWITZ
Assistant to the Solicitor General

ROBERT E. KOPP
DOUGLAS N. LETTER
Attorneys

CARIN ANN CLAUSS
Solicitor of Labor

BEATE BLOCH
Associate Solicitor

LOIS G. WILLIAMS
Deputy Associate Solicitor

KERRY L. ADAMS
WILLIAM TAYLOR
Attorneys
Department of Labor

DECEMBER 1980

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 335269 221